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Handling MSHA Special Investigations

A Strategic Primer for Mine Operators/Contractors



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SPECIAL INVESTIGATIONS

MSHA's Reorganization – Office of Assessments, Accountability, Special Enforcement and Investigations (OAASEI)

- Two major subgroups
 - Civil Penalties and Assessment Center
 - The Special Enforcement, Investigations and Accountability (SEIA) office

MSHA's Reorganization – Office of Assessments, Accountability, Special Enforcement and Investigations (OAASEI)

- SEIA will have two reporting Units:
 - Office of Accountability (OA)
 - Technical Compliance and Investigations Office (“TCI”)
 - Discrimination complaints, special civil or criminal investigations
 - Special enforcement strategies (flagrants, impact inspections, POV, injunctions)

MSHA's Reorganization – Office of Assessments, Accountability, Special Enforcement and Investigations (OAASEI) cont.

- Agency response to criticism following UBB
- Designed to “better target chronic violators”
- TCI's goal – evaluate, develop and refine strategies for use of special enforcement tools

Section 110(c) Investigations

- Section 110(c) of the Mine Act states:

Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) or section 105(c), **any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal** shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsection (a) and (d).

- Knowingly -- "A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence." *MSHA v. Richardson*, 4 FMSHRC 874 (1979).
- Under this standard, aggravated conduct is required.
- The conduct must go beyond simple negligence and be at least high negligence.

Criminal Prosecution under Section 110

- MSHA has authority to bring criminal prosecutions under the Mine Act against a director, officer, or agent.
- MSHA must prove a willful violation of a mandatory health and safety standard.

- Willfully -- "...done knowingly and purposely by a [person] who, having a free will and choice, either intentionally disobeys the standard or recklessly disregards its requirements." *U.S. v. Consolidation Coal Co. & Kidd*, 504 F.2d 1330, 1335 (1974).
 - **MSHA must prove its criminal case "beyond a reasonable doubt."**

Scary Enforcement



Initiation of 110 Investigation

- According to MSHA PPM, the investigation is initiated at the District Manager's request usually due to one of the following:
 - **A mine accident;**
 - **A complaint (such as false reporting or equipment misrepresentation); or**
 - **A review of citations/orders for possible knowing or willful violations. (Inspector's Recommendation)**

According to MSHA's PPM, the following citations/orders WILL be reviewed for possible further action:

- Each 104(a) citation which contributed to a 107(a) imminent danger order of withdrawal;
- Each 104(d) citation/order identified as S&S and the negligence is marked "high" or "reckless disregard"; and
- Each citation issued for working in violation of a withdrawal order.

Investigators

- Investigators are specially trained to investigate for civil or criminal liability of both a company and individual.
- They may or may not identify themselves as investigators - trained to make a friend out of the person they are talking to.
- Always be on guard when talking to an investigator because of individual, civil or criminal liability.

Things to Know About Investigations:

- Investigators typically speak to hourly and supervisory employees, on or off company property.
- The company may not interfere with investigations, but may insist they be conducted in ways not disruptive.
- Need not permit employees to be interviewed on company time, but any policies must be applied on a non-discriminatory basis.
- The company is permitted to provide legal assistance to any supervisor or representative involved -- good policy.

- Important rights can be lost if not timely asserted.
- Important to be fully advised before decisions of whether, when and how to proceed.
- Investigators discourage legal assistance to proceed unimpeded. (legal assistance advisable).
- Investigators are trained to be friendly to encourage speaking without reservation. (Do not be misled).
- All investigations, except certain aspects of accident investigations, can be postponed without adverse consequences.

Prevention and Preparation

Strategies to avoid a Special Investigation:

1. Training / Re-Training of Foremen
 - Mine Safety Regulations
 - Citation Investigation / Pre-assessment
 - Foreman's Rights
2. Safety Policies / Promoting Strong Safety Culture

Prevention and Preparation

3. Stressing Pre-shift, On-shift and Pre-operational Examinations
 - Reporting and Documenting Unsafe Conditions, Behaviors
 - Taking Action on Safety Complaints, Reported Hazards and Conditions
 - Document Action Taken
4. Enforce Safety Policies / Regulations – persistency / consistency
 - Progressive Discipline

Prevention and Preparation

Strategies in anticipation of a Special Investigation:

1. Foremen / Management – Avoid Admissions
2. Investigate all 104(d) Citations and Orders
 - Preserve all pertinent documents / evidence
 - Identify all pertinent witnesses
 - Witness interviews / explain rights

Prevention and Preparation

3. Make Decisions on Independent Representation for Foremen / Hourly Miners - (Indemnification)
4. Conference all 104(d) Citations / Orders
5. Consider Filing Notice of Contest - Section 105 / Expedited Hearing
6. Challenge Pertinent Assessments
7. FOIA Inspector's Notes

Prevention and Preparation

8. Review Documentation for Issues
9. Involve Counsel Early in Process
10. Manage Document Production Carefully
 - marking exhibits / confidentiality / FOIA exemptions
11. Request Written Confirmation from MSHA - No Investigation Pending before Settling / Paying Assessments

105(c)
Discrimination
Complaints

105(c) Discrimination Complaints

Cannot discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise ***interfere with the exercise of the statutory rights of any miner***, representative of miners or applicant for employment in any coal or other mine subject to this Act because such person:

- Has filed or made a safety or health complaint;
- Is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 (Mandatory Health & Safety Standards), or
- has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such person of any statutory right afforded by this Act.

- Section 105(c) applies only where a miner's "protected activity" falls within the Mine Act, its rules and standards, or is otherwise related to safety and health in the mine.
- Discrimination on the basis of race, sex, age, religion, handicap, union activity, or any other non-mining status, is not covered by Section 105(c) of the Act.

Does it Apply to MSHA Employees?

- *Meredith et al v. Federal Mine Safety and Health Review Commission*, 177 F.3d 1041 (D.C. Cir. 1999)
 - Miners alleged that the certain MSHA officials unlawfully discriminated against them for exercising rights protected by the Mine Act.
 - The Court held that the Mine Act's anti-discrimination provision does not apply to MSHA employees for actions taken under color of their authority.

MSHA: Handling 105(c) Complaints

- Purpose: To encourage miners to exercise rights under the Mine Act and to maximize their monitoring safety and health conditions, MSHA vigorously investigates discrimination complaints.
- Any miner who believes that he has been discriminated against may file a complaint with the Secretary.
 - 105(c)(2): A complaint must be filed with the Secretary within 60 days of the alleged act of discrimination.

MSHA: Handling 105(c) Complaints

- After receiving a complaint, the Secretary must investigate:
 - The Secretary's investigation must commence within 15 days of receipt of a complaint. Temporary reinstatement requests are investigated immediately.
 - Within 90 days of receipt of a complaint, the Secretary must make a written determination as to whether discrimination has occurred.

MSHA: Handling 105(c) Complaints

- After investigating, if the Secretary determines that discrimination occurred, the Secretary must “immediately file a complaint with the Commission.”
- After investigating, if the Secretary determines that no violation occurred, the Secretary must notify the miner.
 - The miner then has 30 days from the date of the Secretary’s notice to file an action on his own behalf before the Commission.
 - Legislative History and Case Law: Time frames in section 105(c) cases are not jurisdictional. “The failure to meet any of them should not result in the dismissal of the discrimination proceedings.”

Can't Get No Satisfaction



Temporary Reinstatement

- After investigation, if the Secretary finds that a complaint was “**not frivolously brought**,” the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint.
- “Not frivolously brought” = not defined in the Act
 - The test for whether a case is “not frivolously brought” is whether there is “reasonable cause to believe” that the discharge was motivated in part by the exercise of protected activity.
 - “Reasonable cause to believe” is also equated with “whether a miner’s complaint appears to have merit.”

Temporary Reinstatement

- Opportunity for a hearing on initial temporary re-instatement finding
- The “not frivolously brought” standard applied in the TR stage is less demanding than the standard of proof applied in a hearing on the merits of the underlying discrimination claim – “Relatively Insubstantial Burden”
- In a TR hearing, it is not the judge’s or the Commission’s duty to resolve conflicts in the testimony or make credibility determinations
- Affirmative defenses and alternate theories not dispositive at this stage
 - TR can be granted even where claims are incredible, contrary to substantial evidence, or there is conflicting evidence

Scope of Temporary Reinstatement While a 105(c) Case Remains Pending?

FMSHRC Rule 45(d), 29 C.F.R. Section 2700.45(d) states:

The scope of a hearing on an application for temporary reinstatement is ***limited to a determination as to whether the miner's complaint was frivolously brought*** . . . In support of [his] application . . . , the Secretary may limit [his] presentation to the testimony of the complainant. The respondent shall have an opportunity to cross-examine any witnesses called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint was frivolously brought.

“The scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought.” *Sec'y of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd sub nom. Jim Walter Resources, Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990).

Temporary Reinstatement

- Temporary reinstatement remains in effect “pending final order on the complaint.”
- Gray v. North Fork Coal Corporation
 - In August 2012, the 6th Circuit reversed the Commission and held that temporary reinstatement continues until the Commission issues a final order regarding the merits, even if the Secretary has declined to pursue the complaint and the miner files a claim on his own behalf under section 105(c)(3).

Temporary Reinstatement

- Order rehiring or reinstating to former position with back pay and interest.

-“Temporary Economic Reinstatement”

- Such order shall become final 30 days after its issuance.
- A sum equal to the aggregate amount of all costs and expenses (including attorney's fees) reasonably incurred by the miner shall be assessed against the person committing such violation.

Temporary Reinstatement

- TR is often granted, but has been denied for:
 - Failure to state a claim (layoff + physical discrimination)
 - Voluntarily quitting – admitting does not want to return to work
 - Business contractions / job eliminations - tolling economic reinstatement (burden on company to show work not available – layoff unrelated to “protected activity”)
 - Refusal to complete job duties (non-safety related)
 - Settlement / Waiver / Release of Claims

Temporary Reinstatement

- According to MSHA's January 29, 2013 press release, MSHA filed 46 requests for temporary reinstatement during the 2012 calendar year, more than double any previous year.
- MSHA also filed 34 complaints alleging mine safety discrimination during 2012, also more than in any previous year.
- 2009 – 2012: 101 temporary reinstatement requests, for an average of 25 requests a year.
 - From 1993 to 2008, the average was 8 requests a year.

What Is Discrimination Under the Mine Act?

The Federal Mine Safety and Health Review Commission has held:

- (1) knowledge of protected activity;**
- (2) hostility or animus towards the protected activity;**
- (3) coincidence in time between the protected activity and the adverse action; or**
- (4) Disparate or inconsistent treatment**

are all indications of discriminatory intent.

What Is “Protected Activity” Under the Mine Act?

A miner's complaints or actions are protected even if they go beyond what is required under the Secretary's health and safety standards **“if they are based on a miner's ‘good faith, reasonable belief’ that such precautions are needed”** so long as **“the precautions themselves are reasonable.”**

Sec'y on behalf of Zecco v. Consolidation Coal Co., 21 FMSHRC 985, 993 (Sept. 1999).

Examples of Protected Activity

- Reporting of safety complaints to the operator or MSHA
- Participating in an MSHA inspection or investigation
- Testifying in a legal proceeding
- Refusal to work in unsafe or unhealthy conditions
- Being subject of medical examination and potential transfer
- Exercising any right afforded by the Mine Act

Examples of Adverse Actions

- Discharge, dismissal, suspension
- Demotion
- Reduction in benefits, vacation, bonuses, or rates of pay
- Changes in pay, hours of work, duties or conditions
- Threats of reprisal
- Transfer to another position at a lower rate of pay than that received immediately before the transfer

Who Has the Burden of Proof in a 105(c) Case?

A miner establishes a *prima facie* case of prohibited discrimination by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity.

Secretary of Labor on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-800 (October 1980), *rev'd on other grounds*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981); *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998).

Disparate, or inconsistent, treatment can be indicative of discrimination

Defenses to Discrimination Complaint

- The mine operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800.
- Adverse action motivated by the miner's unprotected activity alone.

Pasula at 2800; *Robinette*, 3 FMSHRC at 817-18; see also *Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

Defenses to Discrimination Complaint

- Layoffs (unrelated to protected activities)
- Decision Maker's Lack of Knowledge of Safety Complaints
- Adverse action motivated by the miner's unprotected activity alone.

Pasula at 2800; *Robinette*, 3 FMSHRC at 817-18; see also *Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

Defenses to Discrimination Complaint

- Termination for safety reasons (despite prior protected activity)
- Disparate treatment due to un-protected activities (careful – could spawn other claims)
- Insubordination / Threats / Hostility (profanity – physical abuse)

105(c) Scenario

- FACTS
 - An hourly employee determines that it is not safe for him to complete a specific job duty.
 - He tells his foreman he does not think it is safe.
 - His foreman looks at the condition and says “Go ahead and do it.”
 - The foreman does not say anything else to the employee, and the employee does not say anything else to the foreman.
- If the employee still refuses, is it insubordination?
- Is the foreman’s response sufficient?

FMSHRC Finds That Employees Were Subjected To Intolerable Working Conditions, Constructively Discharged

- The Commission found that two employees were constructively discharged when their Kentucky employer subjected them to “intolerable working conditions” and forced their resignations as a result of their participation in activity protected by the Mine Act.
- Truck drivers were employed by a haulage company, which contracted with a mine operator to haul coal from the underground mine to a processing plant. In response to the operator’s increasing production and growing stockpile, several drivers were required to work longer hours.

-Continued-

- For approximately six weeks, the drivers allegedly worked 15 to 16 hours per day, six days per week, in violation of state and federal laws. Further, most of the eight-mile drive was over a mountain via a steep, narrow gravel road that often was snow and ice covered.
- Two truckers confronted management about the excessive hours, which was allegedly greeted with profanity from the owner and a directive that if they could not work the required hours they were no longer needed.

-Continued-

- Both employees filed safety discrimination complaints under 105(c) and the company agreed to reinstate them.
- However, the company allegedly refused to assign the two men to the newer trucks they previously had driven, and instead were given older, slower trucks that required a variety of repairs before they could be safely operated. The trucks were not repaired and the drivers to refuse to drive them due to safety concerns and to leave the premises.
- Allegedly, both men were later confronted by company management with profanity-laced statements, and they decided not to return to work.

-Continued-

- The Commission determined that the trucking company had violated 105(c) and that both employees were “constructively discharged.”
- A “constructive discharge” is proven when a miner engaged in protected activity shows that an operator created or maintained conditions so intolerable that a reasonable miner would have felt compelled to resign.

-Continued-

- In determining whether a reasonable person would have felt compelled to resign, each incident or working condition should be viewed in the context of the cumulative effect it could have on the employee.”
- Ultimately, “the operator's disparate treatment of [the truckers], considered in totality from the driver's perspective, including the delay in assignment and repair of vehicles, their assignment to drive trucks in poor condition, and the scorn and verbal abuse to which the operators subjected the drivers, compels the conclusion that the drivers were subject to intolerable working conditions.”

Prevention

- Be attentive and responsive to miner's concerns regarding employment conditions.
- Investigate all safety and health complaints and address them – document action taken (involve HR / Legal)
- Enforce safety policies – apply consistent discipline (involve HR)
- Proper documentation is paramount (meetings, conversations, statements, resolution)

Prevention

- Identify pertinent documents / witnesses
- Interview witnesses – obtain witness statements?
- Preserve evidence / documents
- Consult counsel (preserving privileges)
- Prompt case evaluation and resolution – before complaint filed – (settlement agreement / release)



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Questions?

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